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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91201070
Party	Plaintiff Anderson Valley Acquisition Company, LLC
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Attachments	Opposer's Reply in Support of Opposer's Rule 56(d) Motion.pdf (6 pages) (3833997 bytes)

In their effort to prevent Opposer from obtaining necessary discovery to respond to the Applicants' Motion for Summary Judgment, Applicants seek to have it both ways – they pled facts in support of their Motion for Summary Judgment and then sought to disclaim those facts in their Response to Opposer's Discovery Motion ("Response"). Opposer should be entitled to

obtain discovery with respect to facts pled by Applicants, particularly in a case such as this where Applicants' Motion for Summary Judgment was filed even before any discovery had been obtained.

For example, Applicants allege in their Motion for Summary Judgment that "Roger, and Matthew Harnden, have not yet begun formal use of the mark as applied for, though some preliminary marketing and limited manufacturing of hard cider under similar marks has been made." (Applicants' Motion for Summary Judgment at 10). Applicants further state, "this use is indicative of the type of use that Roger and Matt anticipate will be made under the mark." (Applicants' Motion for Summary Judgment at 10 and Declaration of Scommegna at 2). Applicants attach images of bottles of "Boonville Cider House Bite Hard Apple Currant" and "Boonville Cider House Bite Hard Apple Cider" to their Motion for Summary Judgment.

Applicants later contradict these allegations in their Response by asserting that "Applicants have not used the mark." (Applicants' Response at 3). Applicants make a distinction without a difference - Applicants currently manufacture and market multiple flavors of hard cider (apple cider and apple currant) under the mark for which registration is sought, and those activities lead to facts discoverable by Opposer through oral depositions.

Applicants also allege in their Motion for Summary Judgment that, "Applicant, Roger Scommegna is one of the owners of The Boonville Hotel in Boonville, California...Roger has had an ownership interest in the hotel for over eight years. As part of the services it offers, The Boonville Hotel sells wine beer, **and yes, hard cider**, to its guests." (Applicants' Motion for Summary Judgment at 10 and Decl. Scommegna para. 4) (emphasis supplied).

After tying the Boonville Hotel to the sale of hard cider, Applicants attempt to back-peddle in their Response, stating "nowhere do Applicants claim that the Boonville Hotel has any

connection to their activities or has any ownership or rights in or to the application at issue.” (Applicants’ Response at 6). Applicants cannot have it both ways – arguing facts for their Motion for Summary Judgment and later denying the very same facts in an attempt to limit Opposer’s discovery.

Additionally, Roger Scommegna asserts in his affidavit in support of Applicants’ Motion for Summary Judgment that “Over the years, and recently, I have seen many if not all of the various beer products offered for sale by the Anderson Valley Brewing Company, since, among other things, the Boonville Hotel sells these products as part of its meal offerings and in its small bar.” (Decl. of Scommegna, para. 7).

Although previously alleging that the Boonville Hotel sells hard cider **and** Opposer’s goods, Applicants later argue in their Response that “granting Opposer the opportunity to depose either Scommegna or Harnden with respect to Applicants’ intended or actual sales of the goods under the mark into one or more channels of trade would serve no purpose.” (Applicants’ Response at 5). Applicants’ position is steeped in a double standard; facts are relevant when raised by Applicants in their Motion for Summary Judgment but the same facts are irrelevant when Opposer seeks oral depositions.

The effects of Applicants’ pleadings are certain – if Opposer is unable to conduct oral depositions to test the veracity of the statements presented in Applicants’ Motion for Summary Judgment, Opposer will be severely prejudiced. Therefore, Opposer’s 56(d) Motion should be granted.

II. APPLICANTS HAVE MISINTERPRETED CITED CASES.

Applicants cited *Octocom Systems, Inc. v. Houston Computer Services*, 918 F.2d 937 (Fed. Cir. 1990) and *Bellbrook Dairies, Inc. v. Hawthorne-Mellody Farms Dairy, Inc.*, 253 F.2d

431 (U.S. CCPA 1958) for the proposition that Opposer's discovery is legally limited to the four corners of Applicants' trademark application for BOONVILLE CIDER HOUSE BITE HARD CIDER. Applicants' interpretation of these cases is incorrect.

Octocom and *Bellbrook* both hold that a trademark applicant responding to an opposition cannot claim its actual use of a trademark, rather than the applied for use, will prevent consumer confusion. As a result, an applicant is limited to the four corners of its trademark application when arguing its use will not confuse consumers with a previously registered mark. In this proceeding, Applicants mistakenly apply backwards logic to incorrectly assert that the limitations applicable to Applicants restrain Opposer's discovery. *Octocom* and *Bellbrook* provide no such support to Applicants. If Applicants' reading of *Octocom* and *Bellbrook* were correct, the result would be countless confusingly similar trademark registrations, undermining the purpose of trademark prosecution and the discovery process. Applicants' citation of these cases should be disregarded.

III. OPPOSER REQUIRES ORAL DEPOSITIONS TO OBTAIN PROPER DISCOVERY

The oral depositions of Applicants are necessary because: (1) Applicants' Motion for Summary Judgment rests almost entirely on the Declaration of Roger Scommegna; (2) the Declaration of Roger Scommegna, Applicants' Motion for Summary Judgment and the limited discovery responses provided to Opposer by Applicants raise factual allegations, support for which are solely in Applicants' control; and (3) the issues raised in Applicants' Motion for Summary Judgment are unusually complex, such that absence of an oral deposition of Applicants will seriously prejudice Opposer. *Orion Group Inc. v. Orion Insurance Co.*, 12 USPQ2d 1923, 1925 (TTAB 1989). Written requests will prove wholly inadequate, as demonstrated by

Applicants' responses to Opposer's interrogatories served January 13, 2012, after the January 9, 2012 date Opposer's response to Applicants' Motion for Summary Judgment was due.

IV. CONCLUSION

To adjudicate Applicants' Motion for Summary Judgment without allowing Opposer the opportunity to orally depose Roger Scommegna and Matthew Harnden will deprive Opposer of the discovery needed to place at issue material factual questions in opposition to Applicants' Motion for Summary Judgment. For the foregoing reasons, Opposer respectfully requests this board grant its motion pursuant to Rule 56(d) and continue Applicants' Motion for Summary Judgment pending the conclusion of the depositions requested herein.

DATED: February 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Opposer's Reply Brief in Support of Opposer's Rule 56(d) Motion to Continue Applicants' Motion for Summary Judgment Pending Discovery was served upon:

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via First Class Mail, postage prepaid, this 13th day of February, 2012.

Heather K. Liberman